

1 Sterling J. Stires, Esq.; SBN 199218
2 Holmes Weddle & Barcott, P.C.
3 501 West Broadway, Suite 2060
4 San Diego, California 92101
5 Telephone (619) 358-9987; Fax (619) 487-9551

6 Attorneys for Plaintiff American Marine Corporation
7 dba American Hyperbaric Center

8 UNITED STATES DISTRICT COURT

9 NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION

10
11 AMERICAN MARINE CORPORATION dba
12 AMERICAN HYPERBARIC CENTER,

13 Plaintiffs,

14 v.

15 BLUE SHIELD OF CALIFORNIA,

16 Defendant.

Case No. C 11-00636 WHA

SECOND AMENDED COMPLAINT

Magistrate: Hon. William H. Alsup

Courtroom.: 9

Filed: 02/11/11

Trial: Not set

17
18 COMES NOW Plaintiff American Marine Corporation dba American Hyperbaric Center
19 (“AMC”) by and through its counsel of record, Holmes Weddle & Barcott, P.C., and hereby asserts
20 as follows:

21 **ALLEGATIONS**

22 1. AMC is now and at all relevant times has been a corporation duly conducting business
23 under the laws of the State of Alaska within the Third Judicial District; has paid its taxes due the
24 State and filed its required reports; and is fully qualified to commence and maintain this action.

25 2. Upon information and belief, Blue Shield of California (“Blue Shield”) is an insurance
26 company authorized to conduct business.

27 3. Venue is proper within the Third Judicial District, as the District within which AMC’s
28 claim against Blue Shield arose.

1 4. AMC operates hyperbaric oxygen therapy ("HBOT") treatment facilities in Alaska and
2 Hawaii.

3 5. On August 6, 2008, patient Mark D. Rogers ("Rogers") was prescribed sixty HBOT
4 treatments for soft tissue radionecrosis by Dr. Stephen A. Bangle.

5 6. Rogers is a diabetic and had non-healing wounds in his rectal area.

6 7. On August 2, 2008, Rogers presented to AMC for HBOT treatments at AMC's facility in
7 Wailuki, Hawaii.

8 8. At all pertinent times, Rogers was insured by Blue Shield.

9 9. On August 7, 2008, AMC contacted Blue Shield concerning the HBOT treatments and
10 services prescribed for Rogers.

11 10. AMD notified Blue Shield that the prescribed sixty treatments were HBOT treatments
12 and that Rogers had been diagnosed with soft tissue radionecrosis.

13 11. Blue Shield informed AMC that Rogers had met his deductible of \$500.00, had met his
14 out-of-pocket requirements of \$1,000.00, that no preauthorization for the HBOT was required, that
15 there was no exclusion for HBOT, and that Blue Shield would pay 100% of the allowable amount.
16 The allowable amount referred to by Blue Shield is based upon a written facility agreement between
17 AMC and Alaska BCBS. There is no written facility agreement between AMC and Blue Shield.

18 12. Blue Shield authorized AMC to begin and continue the HBOT treatments to Blue
19 Shield's insured, Rogers.

20 13. AMC began HBOT treatments to Rogers on August 8, 2008.

21 14. On September 12, 2008, at a follow-up appointment with Dr. Bangle, the doctor
22 recommended that Rogers be discharged after forty HBOT treatments.

23 15. AMC provided forty HBOT treatments to Rogers beginning August 8, 2008 through
24 September 17, 2008.

25 16. AMC billed Blue Shield for the HBOT treatments.

26 17. Upon information and belief, Blue Shield is a member and/or participant in BlueCard.

27 18. Upon information and belief, Blue Cross Blue Shield of Alaska ("Alaska BCBS") is also
28 a member and/or participant of BlueCard.

1 19. Through BlueCard, Alaska BCBS tendered payments by Blue Shield to AMC's office in
2 Alaska for the HBOT treatments provided to Rogers.

3 20. On October 24, 2008, AMC received partial payment from Blue Shield, through Alaska
4 BCBS, for portions of the HBOT treatments.

5 21. On November 24, 2008, Blue Shield (through Alaska BCBS) sent explanation of benefits
6 denying payment for some of the HBOT treatments provided by AMC to Blue Shield's insured,
7 Rogers.

8 22. On February 27, 2009, Blue Shield, through Alaska BCBS, hired a company by the name
9 of Calypso to seek a refund of the payments made to AMC for Rogers' HBOT treatments in the
10 amount of \$8,730.00.

11 23. Alaska BCBS, for the benefit of Blue Shield, took an offset of funds owed by Alaska
12 BCBS to AMC for the \$8,730.00 refund payment that Blue Shield was seeking from AMC.

13 24. Upon information and belief, Alaska BCBS returned the off-setted funds of \$8,730.00 to
14 Blue Shield.

15 25. The costs of the forty HBOT treatments AMC provided to Rogers was \$109,375.26.

16 26. Rogers paid \$450.09 toward this outstanding amount.

17 27. The amount currently owed for the HBOT treatments AMC provided to Blue Shield's
18 insured, Rogers, is \$108,925.17.

19 28. Blue Shield has refused to pay the \$108,925.17 to AMC.

20 **COUNT I**

21 **Breach of Contract, Debt**

22 29. AMC hereby realleges and incorporates by reference the allegations set forth in
23 paragraphs 1 through 28 above.

24 30. An oral contract for payment of the HBOT treatments to be administered to Rogers was
25 formed between AMD and Blue Shield.

26 31. AMC provided the HBOT treatments to Rogers based upon the representations mad by
27 Blue shield, including that Blue Shield would pay 100% of the allowable amount.

28 32. AMC performed its obligations under the contract by providing the HBOT treatments to

1 Blue Shield's insured, Rogers.

2 33. Blue Shield breached the contract by refusing to pay.

3 34. Blue Shield breached the contract by taking back funds already paid to AMC for the
4 HBOT treatments to Rogers.

5 35. Blue Shield is liable to AMC for an amount of at least \$108,925.17, with the exact
6 amount to be proved at the time of trial.

7 **COUNT II**

8 **Breach of Covenant of Good Faith and Fair Dealing**

9 36. AMC hereby realleges and incorporates by reference the allegations set forth in
10 paragraphs 1 through 35 above.

11 37. The oral contract between Blue Shield and AMC includes the implied covenant of good
12 faith and fair dealing.

13 38. Blue Shield has deprived AMC of the benefit of the oral contract by refusing to pay for the
14 medical treatments and services provided based upon grounds that were not within the terms of the
15 oral contract.

16 39. Blue Shield's refusal to pay, its asserted basis for refusing to pay, and its recovery of
17 amounts paid are acts that a reasonable person would not regard as fair under the oral contract.

18 40. Blue Shield has breached the implied covenant of good faith and fair dealing in the
19 contract between Blue Shield and AMC.

20 41. Blue Shield's breach of the implied covenant of good faith and fair dealing has caused
21 damages to AMC.

22 42. Based upon Blue Shield's breach of the implied covenant of good faith and fair dealing,
23 Blue Shield is liable to AMC in the sum of at least \$108,925.17, with the exact amount to be proven
24 at the time of trial.

25 **COUNT III**

26 **Misrepresentation**

27 43. AMC hereby realleges and incorporates by reference the allegations set forth in
28 paragraphs 1 through 42 above.

1 44. AMC contacted Blue Shield concerning the HBOT treatments prescribed for Rogers.

2 45. Blue Shield stated that Blue Shield would pay 100% of the allowable amount for the
3 HBOT treatments prescribed and administered by AMC to Rogers.

4 46. The statement by Blue Shield was untrue and misleading.

5 47. The statement by Blue Shield was made with the intent to induce AMC to rely upon the
6 statement.

7 48. AMC provided the HBOT treatments to Rogers relying upon the truth of the statement by
8 Blue Shield.

9 49. As a direct result of AMC's reliance upon the statement by Blue Shield, AMC has been
10 damages relative to the unpaid costs of the HBOT treatments administered by AMC to Rogers.

11 50. Based upon Blue Shield's misrepresentation, Blue Shield is liable to AMC in the sum of
12 at least \$108,925.17, with the exact amount to be proven at the time of trial.

13 **COUNT IV**

14 **Independent Obligation To Pay For Medical Treatments**

15 51. AMC hereby realleges and incorporates by reference the allegations set forth in
16 paragraphs 1 through 50 above.

17 52. Blue Shield misrepresented its coverage of Rogers for the HBOT treatments.

18 53. The misrepresentation of coverage was made to AMC.

19 54. AMC relied upon the statements made by Blue Shield, and provided forty HBOT
20 treatments to Rogers.

21 55. Blue Shield's misrepresentation of coverage gives rise to an independent obligation of
22 Blue Shield to pay for the HBOT treatments AMC provided to Rogers.

23 56. Blue Shield is liable to AMC in the sum of at least \$108,925.17, with the exact amount to
24 be proved at the time of trial.

25 **COUNT V**

26 **Unfair Business Practice**

27 57. AMC hereby realleges and incorporates by reference the allegations set forth in
28 paragraphs 1 through 56 above.

DECLARATION OF SERVICE

American Marine Corporation dba American Hyperbaric Center v. Blue Shield of California
United States District Court, Northern District of California Case No. C 11-00636 WHA

Persons served:

PLEASE SEE ATTACHED SERVICE LIST

Date Served: March 9, 2011

I, the undersigned, declare under penalty of perjury that I am over the age of 18 years and not a party to this action; that I served the above-named persons with the following documents: **Second Amended Complaint**, in the following manner:

☒ I attached a true copy of the above-entitled document to the CM/ECF system. I caused the above-entitled document to be sent to the recipients, as currently maintained as of the date and time of this filing on the CM/ECF system, through electronic transmission. The file transmission was reported as complete and a copy of the notification of electronic filing receipt page will be maintained with the original document in our office.

☐ By placing a copy in a separate envelope, with postage fully prepaid, for each addressee named above and depositing each in the U.S. mail at San Diego, California

☐ I caused each document to be transmitted via the facsimile number(s) listed on the attached service list. The facsimile machine I used complied with California Rules of Court, Rule 2003(3) and no error was reported by the machine pursuant to California Rules of Court, Rule 2008(e).

☐ By leaving, during usual office hours, copies in the office of the person(s) served with the person who apparently was in charge and thereafter mailing (by first-class mail, postage prepaid), copies to the person(s) served at the place where the copies were left.

☐ By leaving copies at the dwelling house, usual place of abode, or usual place of business of the person served in the presence of a competent member of the household or a person apparently in charge of his/her office or place of business, at least 18 years of age, who was informed of the general nature of the papers, and thereafter mailing (by first-class mail, postage prepaid) copies to the person served at the place where the copies were left.

Executed on March 9, 2011, at San Diego, California.

Stephanie Villa
Type or Print Name

Stephanie Villa
Signature

SERVICE LIST

American Marine Corp. dba American Hyperbaric Center v. Blue Shield of California
United States District Court, Northern District of CA Case No. C 11-00636 WHA

Jeffrey J. Waller
Holmes Weddle & Barcott, P.C.
701 W. 8th Avenue, suite 700
Anchorage, AK 99501
Phone 907-274-0666; Fax 907-277-4657
jwaller@hwb-law.com
Attorneys for American Marine Corporation

Adam Pines, Esq.
Manatt, Phelps & Phillips, LLP
11355 W. Olympic Boulevard
Los Angeles, CA 90064
Phone 310-312-4322; Fax 310-914-5820
apines@manatt.com
Attorneys for California Physicians' Service dba
Blue Shield of California

Anthony M. Sholty
Faulkner Banfield, P.C.
One Sealaska Plaza, Suite 202
Juneau, AK 99801
Phone 907-586-2210; Fax 907-586-8090
asholty@faulknerbanfield.com
Attorneys for Blue Shield of California